# RECENT DECISIONS.

CONFLICT OF LAWS—LIABILITY OF A STOCKHOLDER UNDER A FOREIGN STATUTE.—A company was formed under the English Companies Acts, limiting the liability of the stockholder to work mines in the United States, with power to do all things necessary to comply with the laws of any place where the company might carry on business. Plaintiff, having sold machinery to the company in California, upon its insolvency sued the defendant stockholder, setting up a statute of that state. *Held*, the defendant incurred no obligation enforceable in England. *Resdon Iron Works* v. *Furness* [1905] 1 K. B. 304. See NOTES, p. 45.

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.—The plaintiff, owning water rights in a stream lying beyond the defendant's property, brought an action to condemn a right of way to his land through the defendant's irrigation ditch. *Held*, that conditions peculiar to the jurisdiction in which the case arose determined such act to be a taking for a public use. *Clark* v. *Nash* (1905) 198 U. S. 361. See NOTES, p. 46.

CONSTITUTIONAL LAW—TREATIES—ADMIRALTY JURISDICTION.—The libellant sued as a seaman for wages, disregarding an illegal advance, under 30 U. S. St. 763. A treaty with Germany provided that the consular officers of each nation should have exclusive power to determine differences of every kind arising between captains, officers, and crews of the merchant vessels of their own nation. *Held*, the treaty, if applicable, was unconstitutional as depriving a citizen of his right to sue in the Federal Courts. *The Neck* (1905) 138 Fed. 144. See NOTES, p. 51.

CONTRACTS—RIGHT OF EMPLOYERS TO CONTRACT TO DISCHARGE WORKMEN.—The defendant, a member of an employers' association, gave, through the plaintiff surety company, a bond conditioned on his obeying all orders of the organization issued under its constitution. A proper order was issued directing the defendant to discharge certain men and not to re-employ them until they complied with specified requirements. The defendant disobeyed the order, and, on being sued by the plaintiff company on the bond, which plaintiffs had paid, set up the illegality of the contract. *Held*, the agreement was valid and not against public policy. *City Trust Co.* v. *Waldhauer* (1905) 95 N. Y. Supp. 222.

The principles underlying the extreme New York doctrines that give to labor unions the right to strike and enter into agreements to strike, laid down in the cases collected and fully discussed in 5 COLUMBIA LAW REVIEW 239, have here been applied to employers' unions, with the practical result that whatever the one may do may likewise be done by the other. In so holding the court reaches the only logical conclusion.

CONTRACTS—STATUTE OF FRAUDS—ORAL AGREEMENT—ACCORD AND SATISFACTION.—The plaintiff agreed orally, in consideration of the defendant's marrying him, that the marriage should operate as a satisfaction of the defendant's promissory note. After marriage he sued on the note. *Held*, the plea of payment was sustained. *Weld* v. *Weld* (Kan. 1905) 81 Pac. 183.

In an oral agreement made in consideration of marriage, unless there be additional independent acts, *Neale* v. *Neales* (1869) 9 Wall. 1, or fraud, *Peek* v. *Peek* (1888) 77 Cal. 106, marriage alone is not such performance as will take the contract from the operation of the Statute of

Frauds. It is the exact case contemplated by the statute. Pomeroy, Specific Performance, 2nd ed., § 111 and cases cited. The statute does not, however, affect contracts fully performed by both parties. *Maddison* v. *Alderson* (1883) 8 App. Cas. 467. The agreement here was an accord and satisfaction. This consists in actual performance by one party, and acceptance by the other party, of such performance in full satisfaction of the original claim. *Hardman* v. *Bellhouse* (1842) 9 M. & W. 596; *Johnson's Admr.* v. *Hunt* (1883) 81 Ky. 321. It is thus executed by both parties. *Lavrey* v. *Turley* (1860) 6 H. & N. 239. The evidence in the principal case showed such an acceptance, *Thayer* v. *McEwen* (1879) 4 Ill. App. 416, in accord. No objection was taken to the pleading, but, under a plea of payment, evidence of an accord and satisfaction is inadmissible. *Morley* v. *Culverwell* (1840) 7 M. & W. 174; *Ulsch* v. *Muller* (1887) 143 Mass. 379.

COPYRIGHT—INFRINGEMENT—NOTICE OF RETENTION OF CONTROL OVER THE SALE.—The complainant, a member of the American Publishers' Association, inserted in one of their copyrighted books the following notice: "The price of this book at retail is $1,00 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." The defendant dealer purchased with knowledge of this notice and sold for less than $1.00. In denying an injunction the court *held*, the notice was not sufficient to retain in the complainant the copyright incident of control over the sale. *Bobbs-Merrill Co.* v. *Straus* (1905) 139 Fed. 155. See NOTES, p. 50.

CORPORATIONS—IMPLIED POWERS.—By its articles the stock of the defendant corporation, organized to supply natural gas, was put in the hands of a voting trust with the provision that when the subscriptions of shareholders were repaid in dividends, gas should be furnished to the public at cost. *Held*, that such corporation had no power, the supply of natural gas being exhausted, to use its assets in the manufacture and supply of artificial gas. *Gas Trust Co.* v. *Quinby* (1905) 137 Fed. 882.

Expressions governing the powers of a quasi-public corporation in respect to other than its original business should be construed in favor of the grantor, *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420; Brice, Ultra Vires, 2nd Am. ed., 62 n. (a), and with a view to the general purpose of the grant. *Transportation Co.*, v. *Palace Car Co.* (1890) 139 U. S. 24, 49. Courts, in following these principles, have restricted powers that the language on its face seemed expressly to confer; *Lusk* v. *Lewis* (1856) 32 Miss. 297; *Gaslight Co.* v. *Gas Co.* (1894) 161 Pa. St. 510; *Circleville Light Co.* v. *Gas Co.* (1903) 69 Ohio St. 259; but the court in the principal case properly refuses to apply the rule where it would result in an enlargement of the granted powers. See also *Covington Gaslight Co.* v. *Covington* (Ky. 1900) 58 S. W. 803.

EQUITY—BILL TO REMOVE CLOUD ON TITLE—EFFECT OF PENDENCY OF AN EJECTMENT SUIT.—The defendant had instituted an ejectment suit against the plaintiff, relying on a forged deed. During the pendency of this action the plaintiff filed a bill, praying that the deed be delivered up and cancelled and that the defendant be enjoined from prosecuting the ejectment suit. The defendant demurred. *Held*, the bill would not lie; but the court intimated that if the deed was judicially adjudged a forgery, it would then order its cancellation. *Wilson* v. *Miller* (Ala. 1905) 39 So. 178.

It is a general rule that in cases where equity and law have concurrent jurisdiction equity will not take jurisdiction of a cause which is already being tried in the law courts, although the latter are not able to give the full relief that might be obtained in equity. *Bank* v. *R. R. Co.* (1856) 28 Vt.

471; *Mason* v. *Piggott* (1849) 11 Ill. 85; *Whitney* v. *Stevens* (1881) 97 Ill. 483; Pomeroy, Eq. Juris. § 179. To this rule there is the exception that where, as in cases of complex accounts, the machinery of the law court is inadequate to do what it is attempting to do, equity will oust it of jurisdiction. *Ely* v. *Crane* (1883) 37 N. J. Eq. 157. But the principal case does not fall within this exception. As to the relief equity will give after the decision by the law court, see 5 COLUMBIA LAW REVIEW 609.

EQUITY—CONVERSION—SALE NECESSARY TO CARRY OUT TESTAMENTARY PROVISIONS.—The numerous legacies of a will could not be satisfied out of the testator's personal estate. The executors, therefore, acting under their power to "sell any or all of my real estate whenever any such sale be necessary for any purpose of my estate," sold part of the testator's real estate. *Held*, there was an equitable conversion. *In re Vanuxem's Estate* (Pa. 1905) 61 Atl. 876.

Since equitable conversion follows only from the intention of the testator, a mere discretionary power to sell real estate will not work equitable conversion of it into personalty. *King* v. *King* (1882) 13 R. I. 501. But when there is an absolute necessity to sell in order to carry out the provisions of the will, a mere authorization to sell is sufficient; the presumption being that the testator intended that everything essential to carrying out the provisions should be done. *Roy* v. *Monroe* (1890) 47 N. J Eq. 356; *Fraser et al.* v. *Trustees* (1891) 124 N. Y. 479. In accordance with these cases, as the personal property of the testator, after payment of debts, would fail to satisfy the legacies by about $400,000, the presumption as to the testator's intention seems reasonable.

EQUITY—PUBLIC NUISANCE—BAWDY HOUSE—INJUNCTION BY PRIVATE INDIVIDUAL.—The plaintiff, owner of a vacant lot, sought to restrain the defendant from maintaining a bawdy house in a building adjoining this lot, and alleged that it would render a building he intended to erect unavailable for any lawful business, and that his ground was being irreparably injured by diminution in value. The defendant demurred. *Held*, the plaintiff stated a case entitling him to an injunction. *Dempsie* v. *Darling* (Wash. 1905) 81 Pac. 152.

Since *Hamilton* v. *Whittridge* (1857) 11 Md. 128, the courts have generally granted injunctions restraining the maintenance of such nuisances, though the question seems always to have arisen between owners of adjoining occupied houses. *Blagden* v. *Smith* (1899) 34 Or. 394; *Crawford* v. *Tyrrell* (1904) 128 N. Y. 341; *Weakley* v. *Page* (1899) 102 Tenn. 178; *Marson* v. *French* (1884) 61 Tex. 173; contra, *Neaf* v. *Palmer* (1898) 103 Ky. 496; *Anderson* v. *Doty* (1884) 33 Hun, 160. And the fact that land is unoccupied should not cut off relief, occupancy affecting merely the extent not the right of recovery. *Ruckman* v. *Green* (N. Y. 1876) 9 Hun, 225; *Busch* v. *Railroad Co.* (1890) 12 N. Y. Supp. 85; but see *Dana* v. *Valentine* (Mass. 1842) 5 Met. 8. The courts denying the relief seem not to have distinguished between what must be shown to constitute a nuisance, and what is necessary to constitute special damages, the fact of the nuisance being established. In this latter situation, mere diminution in value is sufficient special damage on which to base an injunction. High, Injunctions § 785; and see *Harrison* v. *Good* (1871) L. R. 11 Eq. 338. In the principal case, the maintenance of a bawdy house being a nuisance per se, Wood, Nuisance § 29, and the allegation of reduced value, constituting the necessary special damages, being admitted by the demurrer, the court properly holds that the complaint states a case for injunction.

EQUITY—SPECIFIC PERFORMANCE—DEFECT IN VENDOR'S TITLE.—In an action by the vendor for specific performance of a contract to sell a ten story building, it appeared that the ornamental stone work of the

two lower floors projected two inches over the street line. *Held*, as the city was the only party having the legal right to question the title, and as such action by it was improbable, the vendor's title was marketable. Judgment for the plaintiff. *Empire Realty Co.* v. *Sayre* (N. Y. 1905) 107 App. Div. 415.

While it is usually said that specific performance will not be granted the vendor if the likelihood of litigation is considerable, Fry, Specific Performance §870; Pomeroy, Specific Performance §§ 347-352, the cases cited refused the relief wherever any adverse claim existed, and allowed it whenever such a claim was absent. Moreover, the relief has been denied where a reasonable claim existed although the probability of its enforcement was no greater than in the principal case. *Seaman* v. *Hicks* (N. Y. 1841) 8 Paige 655; *Smithers* v. *Steiner* (N. Y. 1895) 13 Misc. 517; *Klim* v. *Sachs* (N. Y. 1905) 102 App. Div. 44. If the cases are looked at from the point of the actual facts in issue, it would seem that the test for specific performance might well be the existence of a litigable claim rather than the probability of litigation. From the meagre facts, it cannot be determined whether the principal case comes within the well established rule compelling acceptance when the failure of title is to an unessential part only; but in closely analogous encroachment cases, specific performance has been denied, the courts holding this rule did not apply. *Smithers* v. *Steiner*, supra; *Klim* v. *Sachs*, supra.

EQUITY—TRUSTS—DISTINCTION BETWEEN A REVOCABLE TRUST AND AN ATTEMPTED TESTAMENTARY DISPOSITION.—A. deposited five hundred dollars in a bank in trust for B. subject to her order as trustee, the amount remaining at her death to go to B. None of the money was drawn out. *Held*, that B. was entitled to the fund as cestui. *Littig* v. *Mt. Calvary Church* (Md. 1905) 61 Atl. 635.

A person may declare himself trustee for himself for life and on his death for another. *Gerrish* v. *New Bedford Institution* (1880) 128 Mass. 159. A reservation of a power of revocation does not invalidate such a trust. *Dickerson's Appeal* (1886) 115 Pa. 198. It would seem that the only question involved in the principal case is whether the intention was to declare a trust, or merely to make a testamentary disposition. If the latter, the attempt would fail, as it does not comply with the statute of wills. *Bartlett* v. *Remington* (1879) 59 N. H. 364. The confusion in the authorities is due to a failure of the courts to distinguish between the inherent revocability of a testamentary disposition and the revocability stipulated for in a declaration of trust. See *Providence Institution* v. *Carpenter* (1893) 18 R. I. 287. *Taylor* v. *Henry* (1878) 48 Md. 550. Compare 2 COLUMBIA LAW REVIEW 110.

EVIDENCE—ACCOUNT BOOKS—EXPERT ACCOUNTANT'S ABSTRACT OF LOST BOOKS.—The plaintiff sued on an instrument of indebtedness executed to his testator over twenty years before. To rebut the testimony of a former bookkeeper as to the existence of certain items on the defendant's books at a particular date, the defendant offered in evidence an expert accountant's abstract made shortly thereafter in which the item in question did not appear. The books had been lost but the abstract had been verified by present witnesses. *Held*, the exclusion of this abstract was reversible error. *Rosenstock* v. *Dessar* (N. Y. 1905). 34, N. Y. L. Journal No. 36. See NOTES, p. 47.

EVIDENCE—WILLS AND GIFTS—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.—The plaintiff sought to invalidate a will and certain gifts on the ground of undue influence. *Held*, the confidential relations of sisters did not raise such a presumption as to testamentary gifts though they did as to gifts inter vivos. *Hutcheson* v. *Bibb* (Ala. 1905) 38 So. 754.

The question in the principal case is often complicated and obscured by the conflicting views as to where the burden of proving undue influence rests. 2 COLUMBIA LAW REVIEW 268. By the weight of authority, in testamentary gifts confidential relations alone, although an important factor in determining its existence, do not raise a presumption of undue influence. *Barry* v. *Butlin* (1838) 2 Moore P. C. 480; *Will* of *Smith* (1884) 95 N. Y. 516; Wigmore, Evidence § 2503. Contra *Jones* v. *Roberts* (1889) 37 Mo. App. 163. But a testamentary gift from parent to child is excepted from the minority rule. *Bundy* v. *McKnight* (1874) 48 Ind. 502. In gifts inter vivos the weight of authority seems to indicate that these relations alone raise the presumption, *Todd* v. *Grove* (1870) 33 Md. 188, though an exception has been made in the case of a gift by the parent to the child. *Slayback* v. *Nitt* (1898) 151 Ind. 376. Such relations should subject a gift inter vivos to closer scrutiny than one by testament, yet in the absence of any other suspicious circumstance they should not give rise to a presumption. *Woodbury* v. *Woodbury* (1886) 141 Mass. 329.

INSURANCE—MARINE POLICY—INTERPRETATION OF COLLISION CLAUSE.—A vessel insured against "collision with another ship" was injured by striking a wreck which had sunk a few hours before. The wreck was never raised and the cost of doing so would have exceeded the value of the ship. The plaintiff sued upon its policy. *Held*, this was not a collision with another ship. *Burnham* v. *China Mut. Ins. Co.* (Mass. 1905) 75 N. E. 74.

The term "collision" in marine policies refers to the impinging together of two navigable things; *Hough & Co.* v. *Head* (1885) L. J. Q. B. 294, 298; but it is not necessary that both be actually in course of navigation at the time. *London Ass. Co.* v. *Campanhia* (1896) 167 U. S. 149. In accordance with these principles it has been held that a vessel, though sunk a few hours before, is still navigable within the meaning of the term, the vessel having been raised shortly after the contact. *Chandler* v. *Blogg* [1898] 1 Q. B. 32. The wreck in question in the principal case was never raised, but it does not appear that it had been abandoned at the time of the accident,—an important point under the principles of *Chandler* v. *Blogg*, supra, because, so far as intention goes, the character of a transaction is determined at the time of the act, and not subsequently. *Osborn* v. *Governors, etc.* (1727) 2 Strange 728. Therefore, unless at the time of the accident the sunken vessel had been abandoned, the act, under the principles of *Chandler* v. *Blogg*, supra, should have been held a collision.

INTERNATIONAL LAW—OBLIGATIONS OF CONQUEROR.—Gold of the suppliants was seized by the South African Republic before the war. The suppliant sought to recover its value from the English government after its conquest of the republic. *Held*, although in a proper case international law is cognizable in municipal courts, in this case there can be no recovery. *West Rand C. G. M. Co.* v. *Rex* [1905] 2 K. B. 391. See NOTES, p. 49.

MASTER AND SERVANT—SAFE PLACE TO WORK—ASSUMPTION OF RISK.—The plaintiff's intestate, employed by the defendant as a bridgeman, while assisting after nightfall in the removal of a landslide from the defendant's track, the workman having had no opportunity to inspect the premises and the work not being in the course of his employment, was killed by a fall of rock. *Held*, the plaintiff could not recover. *Railway Co.* v. *Whipps* (1905) 138 Fed. 13.

It has been held that a servant with no opportunity to inspect does not assume the risks incurred in doing work outside the ordinary scope of his employment. *Benzing* v. *Steinway* (1886) 101 N. Y. 547. On the other hand the duty of a master to provide a safe place to work applies only to places provided or controlled by him, 2 COLUMBIA LAW REVIEW 125, and is limited to the exercise of ordinary care. *Railway Co.* v. *Jarvi*

(1892) 53 Fed. 65; *Curley* v. *Hoff* (1899) 62 N. J. L. 758. In the absence of such a duty the principles of assumption of risk as an affirmative defence have no application. The doctrine first mentioned cannot, therefore, become material in the principal case and should raise no question as to its correctness.

PERSONAL PROPERTY—GARAGE KEEPER'S LIEN.—Plaintiffs claimed a lien for repairs to an automobile kept at their garage under a monthly contract. The owner exercised the right to use it at his pleasure. Defendant, as sheriff, levied upon the automobile, while in the garage, under an execution against the owner. *Held*, no common law lien attached, because plaintiffs did not have continuous possession. *Smith* v. *O'Brien* (1905) 94 N. Y. Supp. 673.

Under the common law rule that one, who by his skill and labor has enhanced the value of a chattel, acquires a lien on it, 2 Kent Com. 12th ed. 635, the plaintiffs would have a lien. However, the principal case follows the well established rule that, as a lienor must have the right of continued possession, a right in the owner inconsistent with this destroys the lien. *Forth* v. *Simpson* (1849) 13 Q. B. 680. This was one of the reasons why livery stable keepers and agisters had no lien at common law. *Jackson* v. *Cummings* (1839) 5 M. & W. 341; *Grinnell* v. *Cook* (1842) 3 Hill 485. But under statutes granting liens to livery stable keepers, it has been generally held that the use of the horse by the owner in his business does not destroy the lien. *Caldwell* v. *Tutt* (Tenn. 1882) 10 Lea 258; *Welsh* v. *Barnes* (1895) 5 N. D. 277; *State* v. *Shevelin* (1886) 23 Mo. App. 598; contra, *Estey* v. *Cooke* (1877) 12 Nev. 276. In the absence of a similar statutory lien to keepers of automobiles, the decision of the principal case appears sound.

PLEADING AND PRACTICE—ABSENCE OF JUDGE WHEN VERDICT WAS RENDERED—CONSENT OF PARTIES.—In a civil action, the plaintiff and the defendant consented that the clerk of the court might receive the verdict in the absence of the presiding justice. The defendant having made a motion for new trial without making objection as to the manner of receiving the verdict, appealed to the Appellate Division, and then to the present court, where for the first time he sought to show that the reception of the verdict and the judgment rendered thereon were invalid. *Held*, the absence of the judge was merely an irregularity and the defendant was estopped by his conduct and laches from repudiating his stipulation. *Dubuc* v. *Lazell* (1905) 182 N. Y. 482.

The only valid verdict upon which a judgment can be given is one rendered in open court. *Root* v. *Sherwood* (N. Y. 1809) 6 Johns. 68; *Lawrence* v. *Stearns* (Mass. 1833) 11 Pick. 501; 3 Bl. Comm. 377; 5 Bacon Abr. 282. There can be no court without a judge, *Hobart* v. *Hobart* (1877) 45 Ia. 501; *Ingersoll* v. *Lansing* (N. Y. 1889) 51 Hun, 101, and no valid judgment can be entered on an open verdict received in his absence. *Morris* v. *Harburger* (N. Y. 1905) 100 App. Div. 357. The parties cannot by stipulation change "the substantial constitution of the legal tribunal and the fundamental mode of its proceeding," *Cancerni* v. *People* (1858) 18 N. Y. 128, 136, nor cure an invalid judgment. *Ingersoll* v. *Lansing*, supra; *French* v. *Merrill* (N. Y. 1898) 27 App. Div. 612. A result, seemingly exactly opposite to that of the principal case, was logically reached in *B. & O. R. R.* v. *Woods & Co.* (Va. 1858) 14 Grat. 447; contra, *Bedal* v. *Spurr* (1885) 33 Minn. 207. And see, as to verdicts in criminal prosecutions, *McClure* v. *State* (1881) 77 Ind. 289. The verdict being void, laches should be immaterial.

PLEADING AND PRACTICE—CLOUD ON TITLE—STATE A NECESSARY PARTY.—An action was brought by plaintiff against the commissioners of the land office and the state comptroller to have a tax sale deed of prop-

erty, which had been issued to the people of the state, adjudged illegal and void. *Held*, the state as holder of the adverse title was a necessary party defendant, and in the absence of a statute permitting it to be sued, the action must fail. *Sanders* v. *Saxton et al.* (1905) 182 N. Y. 477.

A bill to remove cloud on title will lie against a municipal corporation, *Rumsey* v. *City of Buffalo* (1884) 97 N. Y. 114; *Dean* v. *City of Madison* (1859) 9 Wis. 402, and against commissioners claiming to enforce an assessment. *Nichols* v. *Voorhis* (N. Y. 1876) 9 Hun, 171. But, notwithstanding a sovereign state cannot be sued without its consent, ejectment has been sustained against commissioners in possession under a tax sale deed to the United States, although the government was the party ultimately affected. *United States* v. *Lee* (1882) 106 U. S. 196. The question would seem to depend upon the nature of the title vested in the people. If the land is deeded to them in their corporate capacity, the plaintiff's only remedy is through the legislature.

PLEADING AND PRACTICE—JUDGMENT—ASSIGNMENT—RIGHTS PASSING.—Plaintiff, assignee of a judgment, sued defendant, a public officer, for a breach of duty relating to the judgment committed prior to the assignment, by which the security of the judgment was impaired. *Held*, a litigious right did not pass as an incident of the judgment, though it might have been assigned. *Commonwealth* v. *Wampler* (Va. 1905) 51 S. E. 737.

The rule that an assignment of a debt secured by a mortgage passes the mortgage, *Jackson* v. *Blodgett* (N. Y. 1825) 5 Cow. 202, has been extended to the assignment of judgments, *Bowdoin* v. *Colman* (N. Y. 1856) 6 Duer 182, 186, so that with the assigned judgment, the debt and all the beneficial interest of the assignor in the judgment and its incidents, pass. *Bolen* v. *Crosby* (1872) 49 N. Y. 183; Freeman, Judgments, 3rd ed. § 431. The courts hopelessly vary in interpreting the rule. They have held that an action on an appeal bond did not pass with an assignment; *Chilstrom* v. *Eppinger* (1899) 127 Cal. 326, s. c. 78 Am. St. Rep. 46 and notes; contra, *Ullman* v. *Kline* (1877) 87 Ill. 268; nor did an action, admittedly assignable, against a clerk through whose negligence a judgment lien was wholly lost. *Redmond* v. *Staton* (1859) 116 N. C. 140. A result opposite to that of the principal case was reached on the theory that, the officer still being liable, and the assignor not having expressly retained the right of action, it must have passed to the assignee as an incident of the judgment. *Citizens Nat. Bank* v. *Loomis* (1896) 100 Iowa 266. This ruling seems more in accord with the intention of the parties.

PLEADING AND PRACTICE—PLEAS TO JURISDICTION AND MERITS.—Under a system allowing contradictory pleas, the defendant pleaded to the jurisdiction of his person and to the merits. *Held*, the former was waived. *Putnam Lumber Co.* v. *Ellis Young Co.* (Fla. 1905) 39 So. 193.

While at common law a plea in bar may not be joined with a plea in abatement, yet under the code systems it is everywhere held that the ordinary plea in abatement, as for nonjoinder, or for lack of jurisdiction of the subject, may be joined with a plea to the merits. *Erb* v. *Perkins* (1877) 13 Ark. 428; *Sweet* v. *Tuttle* (1856) 14 N. Y. 465; *Gardner* v. *Clark* (1860) 21 N. Y. 399; *Cohn* v. *Lehman* (1877) 93 Mo. 574. But an answer is a general appearance, *Reed* v. *Chilson* (1891) 40 N. Y. St. R. 960, affirmed in 142 N. Y. 152, and in cases where an appearance cures a defect in the service of summons and confers jurisdiction, it is held that a plea to the merits, even if coupled with a plea to the jurisdiction, is a submission to the jurisdiction. *Reed* v. *Chilson*, supra, discrediting *Hamburger* v. *Baker* (N. Y. 1885) 35 Hun, 455. The principal case is supported by reason and authority, and the cases contra, *Christian* v. *Williams* (1889) 35 Mo. App. 297, fail to distinguish between joinder with a plea to the merits of an ordi-

nary plea in abatement, and of a plea to the jurisdiction of the person. *Sullivan* v. *Frazee* (N. Y. 1855) 4 Robertson 616.

QUASI CONTRACTS—RETURN OF BENEFIT BY PLAINTIFF.—The plaintiff purchased from the defendant a scholarship which gave him the privilege of attending the defendant's school until he should become proficient in shorthand. After he had attended for a time, but before he had become proficient, he was expelled without reason, and sued to recover the price of the scholarship. *Held*, the plaintiff could recover such price in full without returning the value of the instruction he had received. *Timmerman* v. *Stanley* (Ga. 1905) 51 S. E. 760. See NOTES, p. 53.

REAL PROPERTY—ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—Congress granted the plaintiff's predecessor in title a right of way through public lands, "to build and extend its line." The defendants for twenty-seven years cultivated a part of the right of way not used by the plaintiff, who brought this action to quiet title. The defendant pleaded the statute of limitations. *Held*, the statute was not a bar. The plaintiff held but a conditional grant, unalienable, to which, therefore, another party could not gain title by adverse possession. *O. S. L. R. R.* v. *Quigley* (Idaho 1905) 80 Pac. 401.

The federal supreme court has held "that the nature of the duties imposed by Congress upon the railroad company, and the character of the title conferred by Congress in giving the right of way . . . are inconsistent with the power of the individual to acquire, for private purposes, by limitation, a portion of the right of way." *N. P. Ry. Co.* v. *Townsend* (1902) 190 U. S. 267; contra, *N. P. Ry. Co.* v. *Ely* (1901) 25 Wash. 384. The same result has been reached by holding that cultivation of a portion of such a right of way is not adverse user, *Railroad* v. *Donovan* (1890) 43 Kan. 134, or that the right of way is a public highway. *S. P. Co.* v. *Hyatt* (1901) 132 Cal. 240. But title by adverse user has been recognized where the right of way was given by state grant. *Illinois C. R. R.* v. *Wakefield* (1898) 173 Ill. 564. Where the right of way is obtained from individuals, the courts generally permit title to be gained by adverse user. *Matthews* v. *R. R. Co.* (1896) 110 Mich. 170; *Wilmot* v. *R. R. Co.* (1898) 76 Miss. 374; *Pittsburgh, etc., R. R. Co.* v. *Stickley* (1900) 155 Ind. 312; contra, *Slocumb* v. *R. R. Co.* (1882) 57 Ia. 675; *Railroad* v. *Donovan* (1900) 104 Tenn. 20.

REAL PROPERTY—HIGHWAYS—TRACKS LEADING TO STONEHENGE.—The defendant enclosed by a fence Stonehenge, visited from time immemorial by the public, thus cutting off approach by several formerly used tracks. The plaintiff sued to compel the opening of these. *Held*, as the tracks terminated at a privately owned monument, mere user of them, without expenditure thereon by the public, would not give rise to an implied dedication of them as highways. *Attorney General* v. *Antrobus* [1905] 2 Ch. 188.

Normally a highway is a way between two public places. *Campbell* v. *Lang* (1853) 1 Macq. 451; *Bourke* v. *Davis* (1889) 44 Ch. Div. 110, 122; *People* v. *Jackson* (1859) 7 Mich. 432, 449. But, while the early law was to the contrary, Angell, Highways, 23, it is now clearly established that a culde-sac may be a highway, *Rugby Charity* v. *Merryweather* (1790) 3 East 374 (note); *Rex* v. *Lloyd* (1808) 1 Campb. 260; *Bateman* v. *Bluck* (1852) 18 Q. B. 870; *Wiggins* v. *Tallmadge* (N. Y. 1851) 11 Barb. 457, though its public character has been made to depend not on mere user alone, but on the fact of a public expenditure thereon. *Bourke* v. *Davis*, supra; but see *Baker* v. *Clark* (1828) 4 N. H. 380, 383. As the tracks in question were neither highways nor culs-de-sacs within the definitions given, the court properly refused the relief prayed for.

REAL PROPERTY—RAILROAD RIGHT OF WAY—NATURE OF INTEREST ACQUIRED BY PURCHASE.—Defendant conveyed to a railway company by a "warranty" deed a right of way. Its route being changed the company conveyed the land to the plaintiff who brought this ejectment. *Held*, that the land reverted to the defendant when the company abandoned it as a right of way. *Abercrombie* v. *Simmons* (Kan. 1905) 81 Pac. 208.

A railroad is a public highway. *Olcott* v. *Supervisors* (1872) 16 Wall. 678. At common law the original owner retained the fee whether a highway was acquired by dedication, *Lade* v. *Shepherd* (1735) 2 Strange 1004; Angell, Highways § 132, or by eminent domain, since no greater interest might be taken than was necessary for the purpose. *New Orleans Pac. Ry. Co.* v. *Gay* (1880) 32 La. Ann. 471, and this latter point has been held even where there was a voluntary grant in terms a fee simple. *Norton* v. *Railway Co.* (1878) L. R. 9 Ch. Div. 623; *N. Y., etc., Railroad* v. *Aldridge* (1892) 135 N. Y. 83, 95. Consequently, on abandonment the land should revert to the original owner. *C. & E. I. R. R. Co.* v. *Clapp* (1903) 201 Ill. 418. Moreover, for obvious reasons even a voluntary conveyance, for a mere right of way, to a company having the power of condemnation, is in effect a forced sale. *Hill* v. *Railroad* (1859) 32 Vt. 68, 74–77. And while clearly a railway company may acquire land in fee simple (but see the cases cited above as to the estate conveyed by even a fee simple grant), still it would seem that a conveyance for the express purpose of a right of way should give no greater rights than those acquired under condemnation proceedings; and in this view, on abandonment the land should revert to the original grantor. *Jones* v. *Van Bochove* (1894) 103 Mich. 98.

SALES—FRAUD—FALSE REPRESENTATIONS TO INDUCE SALES OF STOCK.—The plaintiff was secretary of a company in which the defendants S. and T. were respectively president and vice-president. S. induced the plaintiff to sell his stock to T., for a fourth of its value, by falsely representing to him that the company was losing money, was about to fail, and that S. himself had sold out his holdings to T. In reality S. was in collusion with T. and had furnished the latter with funds to buy the plaintiff's stock. *Held*, for the defendant; the rule of "caveat vendor" should apply. *Boulden* v. *Stilwell* (Ind. 1905) 60 Atl. 609.

While false representations as to matters of opinion or conjecture will not support an action for deceit, Kerr on Fraud, Bump's ed., 82, still the defendant's concealment of his true interest in the transaction, on principle, amounted to fraud. *Lindsay Petroleum Co.* v. *Hurd* (1874) L. R. 5 P. C. 221, 243; *Fisher* v. *Budlong* (1873) 10 R. I. 525. The principal case, therefore, seems incorrectly decided. *Upton* v. *Weisling* (Ariz. 1903) 71 Pac. 917. Moreover the case of *Vernon* v. *Keys* (1810) 12 East, 632, which the court seems to have regarded as controlling, is contra, in theory at least, to the later cases of *Jones* v. *Keene* (1841) 2 Moody & Rob. 348, and *Lindsay Petroleum Co.* v. *Hurd*, supra, and may no longer be considered authoritative. See 11 Revised Reports, Preface VI; Pollock, Torts, 6th ed. 278 n.

TORTS—CONSPIRACY AS A CAUSE OF ACTION.—In an action for damages suffered from a conspiracy to ruin the plaintiff's business, slanderous words and malicious prosecution were set out as overt acts. *Held*, the complaint was bad for misjoinder of slander and malicious prosecution as causes of action. *Green* v. *Davies* (1905) 182 N. Y. 499.

The theory of a distinct action on the case for damages suffered from a conspiracy has been recognized in England, *Gregory* v. *Duke of Brunswick* (1843) 6 Scott N. S. 809, and in this country. *Brown* v. *Mortgage Co.* (1904) 97 Tex. 599; *Fisher* v. *Schuri* (1889) 73 Wis. 370; *Jones* v. *Morrison* (1883) 31 Minn. 140; *Page* v. *Parker* (1861) 43 N. H. 363. The decision of the principal case, overruling that doctrine, several times asserted

in the lower court, *Rourke* v. *Drug Co.* (1902) 77 N. Y. Supp. 373; *Green* v. *Davies* (1904) 82 N. Y. Supp. 54; Id. (1905) 91 N. Y. Supp. 470, and disregarding the attitude of the Court of Appeals in *Place* v. *Minster* (1875) 65 N. Y. 89, is not required by the authority it cites. It proceeds upon an improper conclusion drawn from the doctrine that the damage done is the gist of the action of conspiracy. Burdick on Torts, p. 288. See also 5 COLUMBIA LAW REVIEW 233.

TORTS—NEGLIGENCE—LIABILITY OF OWNER OF ELEVATOR.—The plaintiff while a customer in defendant's store, was injured in attempting to enter the elevator. *Held*, the relation of carrier and passenger was established, and the highest degree of care was thereby imposed on the defendant. *Morgan* v. *Saks* (Ala. 1905) 38 So. 848.

It has been held that persons operating elevators are carriers of passengers, *Hartford Deposit Co.* v. *Sollitt* (1898) 172 Ill. 222, and that there is no distinction between the degree of care required from a carrier of passengers horizontally by railroad, and one who carries them vertically by a passenger elevator. *Treadwell* v. *Whittier* (1889) 80 Cal. 574; *Mitchell* v. *Marker* (1894) 62 Fed. 139; 1 COLUMBIA LAW REVIEW 399. But a person maintaining an elevator is not technically a common carrier, as there is no duty to carry the public at large. *Seaver* v. *Bradley* (1901) 179 Mass. 329. Accordingly it has been said that while due care must be used by the owner for the safety of his patrons, *Tousey* v. *Roberts* (1889) 114 N. Y. 312, since he is not a common carrier, the utmost degree of human diligence should not attach to him; but that his duty is to use reasonable care only. *Griffen* v. *Manice* (1901) 166 N. Y. 188, 198; *Edwards* v. *Manufacturers Bld'g Co.* (R. I. 1905) 61 Atl. 646.

TORTS—WRONGFUL DEATH STATUTE—ILLEGITIMATE CHILD.—A bastard child of the plaintiff was negligently killed by the defendant railway. *Held*, the plaintiff, the child's mother, could not maintain an action under a wrongful death statute. *McDonald* v. *Southern Ry.* (S. C. 1905) 51 S. E. 138.

At common law an illegitimate child was nullius filius and was considered as having no kindred. 2 Kent Com. 212. It has therefore been held that no recovery could be had under a wrongful death statute for the death of such a child. *Dickinson* v. *Railroad Co.* (1863) 2 H. & C. 734; *McDonald* v. *Railroad Co.* (1895) 144 Ind. 459; contra, *Muhl* v. *Railroad Co.* (1859) 10 Ohio St. 272. But in America, under the influence of statutes allowing an illegitimate child to inherit from its mother, some courts have allowed to the mother a recovery. *Marshall* v. *Railroad Co.* (1893) 120 Mo. 275; *Security, etc., Co.* v. *Railway Co.* (1900) 91 Ill. App. 332. This would seem to be the more humane and reasonable view. But see *Robinson* v. *Railroad Co.* (1902) 117 Ga. 168. However, as there was no such statute as to inheritance in the principal case, the decision is to be supported on technical grounds.